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Supreme Court of the United States

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, WHO SUES AS THE ADMINISTRATRIX OF THE ESTATE OF HURY O. REYNOLDS, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED AUGUST 19, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

MRS. MARIE REYNOLDS, WHO SUES AS THE ADMINISTRATRIX OF THE ESTATE OF HURY O. REYNOLDS, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

INDEX

	Original	Print
Record from Circuit Court, Tenth Judicial Circuit of the State of Alabama	1	1
Certificate of appeal	1	1
Agreement to abridge record on appeal	4	1
Summons	5	2
Complaint	5	2
Sheriff's return	12	10
Demurrer	12	10
Amendment to demurrers	13	11
Demurrer of defendant to complaint as last amended	14	12
Order sustaining demurrer and granting motion for non-suit	20	20
Security for costs on appeal (omitted in printing)	21	
Citation on appeal to Supreme Court of Alabama	22	21
Clerk's certificate (omitted in printing)	23	
Proceedings in Supreme Court of Alabama	24	22
Specifications of error	24	22
Opinion, Livingston, J.	26	23
Judgment	32	28
Application for rehearing	33	29
Order overruling application for rehearing	34	29
Clerk's certificate (omitted in printing)	35	
Order allowing certiorari	36	29

[fols. 1-3]

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

CERTIFICATE OF APPEAL

I, O. L. Andrews, Clerk of the Circuit Court in and for said County and State, do hereby certify that in the cause of Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, Appellant, vs. Atlantic Coast Line Railroad Company, a corporation, Appellee, which was tried and determined in this Court on the 2 day of July, 1947 wherein non-suit was declared and entered, the pltff. prayed for and obtained an appeal to the Supreme Court of Alabama, to be holden in and for said State.

I further certify that on the 10 day of Sept., 1947, notice the plaintiff filed Security for costs of appeal to the Supreme Court of Alabama, and that J. K. Reynolds, Erle Pettus and Al G. Rives are sureties on said security for costs for all costs of said appeal.

I further certify that on the 13th day of Sept., 1947, notice of appeal was du y served on Graham, Bibb & Wingo, Attorneys of record for said Appellee.

Witness my hand and seal of Office this the 15 day of Sept., 1947.

O. L. Andrews, Clerk Circuit Court, Tenth Judicial Circuit of Alabama. (Seal.)

[fol. 4] IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Number 13390-X

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased, Plaintiff,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

AGREEMENT TO ABRIDGE RECORD ON APPEAL—Filed November 18, 1947

The parties in the above cause, by and through their respective attorneys of record, do hereby mutually agree that

the record of this cause on appeal may be abridged, as provided under Rule 28, Rules of Practice of Supreme Court of Alabama, Title 7 of 1940 Code of Alabama, so that the record on appeal will not include Counts One to Nine, both inclusive, of plaintiff's complaint, it being expressly understood and agreed by the parties that the record on appeal shall only contain Counts Ten, Eleven and Twelve of plaintiff's complaint, together with all other proceedings had in the cause.

Jackson, Rives and Pettus, by Herbert W. Paterson, as Attorneys of Record for Plaintiff; Graham, Bibb, Wingo and Foster, by Peyton D. Bibb, as Attorneys of Record for Defendant.

Filed in office Nov. 18, 1947.

[fol. 5] IN THE CIRCUIT COURT OF SAID COUNTY

SUMMONS

To Any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon Atlantic Coast Line Railroad Company, a corporation, to appear before the Circuit Court of said County, to be held at the place of holding the same, within thirty days from service of this process then and there to answer the complaint of Mrs. Marie Reynolds, who sues as the Administratrix of the Estate of Hury O. Reynolds, deceased.

Witness my hand this 26th day of August, 1946.

O. L. Andrews, Clerk.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

COMPLAINT—Filed July 2, 1947

Count Ten

The plaintiff, who sues as the administratrix of the Estate of Hury O. Reynolds, deceased, and for the use and benefit of herself as the widow of the said Hury O. Reynolds, deceased, claims of the defendant the sum of to-wit, one hundred thousand ($100,000.00) dollars as damages for that heretofore, on, to-wit, the 10 day of November, 1945, the defendant was engaged in the business of transporting

freight as a common carrier by railroad, and as such common carrier was engaged on said date in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commerce or freight originating in the state of Florida destined and moving to a point or place outside of the state of Florida or originating at a point or place without the state of Florida, and destined to or moving to a point or place within the state of Florida, and the plaintiff avers that on said date, to-wit the 10th day of November, 1945, the said Hury O. Reynolds was an employee of the defendant on one of the defendant's freight trains, known as freight train Number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while [fol. 6] the said Hury O. Reynolds was acting within the line and scope of his employment by the defendant, and in and about the transportation of interstate commerce by railroad, the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds was riding in the performance of his duties for the defendant at said time and place, and the plaintiff avers that said railroad train of the defendant consisted of the engine and tender, approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida and that the said Hury O. Reynolds in and about said switching operations was required to act and did begin to act as the socalled footboard brakeman and as such brakeman, shortly before arriving at the point where he was injured and killed, he had taken his position on the lead end of the sixth (6th) car from the

caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the car upon which the said Hury O. Reynolds was riding at said time and place upon said side track as aforesaid and upon nearing the switch leading into said side track, where said ten (10) cars were to be spotted, the said Hury O. Reynolds was required to pass a signal to the engineer so as to inform the engineer as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible to the engineer, the said Hury O. Reynolds was required to give said signal while suspended from engineer's side of said moving train, and the plaintiff avers that if the defendant had not negligently failed to provide the said Reynolds with a reasonably safe place to work as aforesaid, the said Reynolds would have descended the engineer's side of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car, but because of the close proximity of said tall canes to the railroad track at said time and place, his said signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because [fol. 7] of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car as said gondola car passed the place where said tall canes were then and there growing, the said Reynolds was caused to cross over the front end of said gondola car in order to climb aboard a tank car immediately in front of said gondola car as from the side of said tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes and as he could give said signal from the side of said tank car which would be visible to the engineer, and the plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid, the said Reynolds was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of his duties at said time and place, had the defendant not negligently failed to provide him with a reasonably safe place to work in negligently allowing said tall canes to be and remain in close proximity to said rail-

road track at said place. And the plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train he fell from said train and was run over by said train and was injured so that he died.

And the plaintiff avers that the injuries and death of her husband and intestate, the said Hury O. Reynolds, was proximately caused by the negligent failure of the defendant to provide him with a reasonably safe place to work as aforesaid and plaintiff avers that on account of and as a proximate consequence of the death of the said Hury O. Reynolds, the plaintiff as his widow and total dependent suffered great pecuniary loss. Plaintiff further avers that this action is brought under what is generally known as the Federal Employer's Liability Act.

Count Eleven

The plaintiff, who sues as the administratrix of the estate of Hury O. Reynolds, deceased, and for her use and benefit as the widow of the said Reynolds, deceased, claims of the defendant the sum of One Hundred Thousand Dollars ($100,000.00) as damages for that heretofore on to-wit, the 10th day of November, 1945, the defendant was engaged in the business of transporting freight as a common carrier by railroad and as such common carrier was engaged in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commercial freight originating in the State of Florida destined and moving to a point [fol. 8] or place outside of the State of Florida, or originating at a point or place without the State of Florida and destined or moving to a point or place within the State of Florida, and the plaintiff avers that on said date, to-wit, the 10th day of November, 1945, the said Reynolds was an employee of the defendant on one of the defendant's freight trains known as freight train number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while the said Reynolds was acting within the line and scope

of his employment by the defendant and in and about the transportation of interstate commerce by railroad; the defendant negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties required of him and his fellow servants at said time and place in this, that the defendant furnished as a brakeman to work with Reynolds on said train at said time and place one W. E. Skelly who the plaintiff avers was incompetent and unskilled as a railroad brakeman and who had he been a competent and skilled railroad brakeman at said time and place would have been required, in the performance of his duties with the defendant, as the train upon which the said Reynolds and the said Skelly were then and there riding neared the switch at the junction of the main line of the Florida-East Coast Railroad Company with the Florida-East Coast exchange track located at Lake Harbor, to give a signal which would be visible to the engineer at the head of said train so as to inform the engineer as to the point where said train should be stopped preparatory to engaging in a switching movement and the plaintiff avers that because the said Skelly was incompetent and incapable of performing his said required duties as a railroad brakeman at said time and place the said Reynolds as the only other brakeman on said train at said time and place was required to undertake the performance of the duties of the said Skelly as a railroad brakeman at said time and place, the said Reynolds being thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train and the plaintiff avers that while the said Reynolds was engaged in the performance of the duties of the said Skelly and the conductor was engaged in [fol. 9] the performance of the duties of the said Reynolds and while the said Skelly was standing idly by and not engaged in the performance of any duties whatsoever, the said Reynolds fell between two cars of said moving train and was run over by said train and was injured so that he died on said date. And the plaintiff avers that the death of the said Reynolds was a proximate consequence of the negligence of the defendant in negligently failing to provide the said Reynolds with an adequate number of competent fellow servants as aforesaid and plaintiff avers that as a proximate consequence of the death of the said Rey-

nolds, the plaintiff as his widow and total dependent, suffered great pecuniary loss all as aforesaid. The plaintiff avers that this action is brought under what is generally known as the Federal Employer's Liability Act.

Count Twelve

The plaintiff, who sues as the administratrix of the Estate of Hury O. Reynolds, deceased, and for the use and benefit of herself as the widow of the said Hury O. Reynolds, deceased, claims of the defendant the sum of, to-wit, one hundred thousand ($100,000.00) dollars as damages for that heretofore, on, to-wit, the 10th day of November, 1945, the defendant was engaged in the business of transporting freight as a common carrier by railroad, and as such common carrier was engaged on said date in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commerce or freight originating in the state of Florida destined and moving to a point or place outside of the state of Florida or originating at a point or place without the state of Florida and destined to or moving to a point or place within the state of Florida, and the plaintiff avers that on said date, to-wit, the 10th day of November, 1945, the said Hury O. Reynolds was an employee of the defendant on one of the defendant's freight trains, known as freight train Number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while the said Hury O. Reynolds was acting within the line and scope of his employment by the defendant, and in and about the transportation of interstate commerce by railroad, the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the [fol. 10] defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds

was riding in the performance of his duties for the defendant at said time and place, and that the defendant further negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties required of him and his fellow servants at said time and place in that they provided as one of the two brakemen on said train one W. E. Skelly, the said Reynolds being the other brakeman, and the plaintiff avers that the said Skelly was incompetent and unfit properly to perform and discharge the duties which were assigned to him at said time and place as a footboard brakeman as a part of the following switching movement: the railroad train of the defendant consisted of the engine and tender approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida, in connection with which the said Skelly, had he been competent and reasonably skilled as a railroad brakeman, would have been required to take his position on the lead end of the sixth car from the caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the sixth car upon said side track and upon nearing the switch leading into said side track where said ten (10) cars were to be spotted, the said Skelly, had he been reasonably skilled and competent as a railroad brakeman would have been required to pass a signal to the engineer so as to inform him as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible — the said Skelly, had he been reasonably skilled and competent as a railroad brakeman, would have been required to give said signal while suspended from the engineer's side of said moving train, but because the said Skelly was not reasonably skilled and competent as a railroad brakeman the said Reynolds was required to undertake and perform the said duties of the said Skelly and the said Reynolds was thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train. The plaintiff avers that if the defendant had not negligently failed to provide a reasonably safe place to work and per-

[fol. 11] form the duties of the said Skelly which were then

and there being performed by Reynolds the said Reynolds would have descended the engineer's side at the head end of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car but because of the close proximity of said tall canes to the railroad track at said time and place, his signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car, as said gondola car passed the place where said tall canes were then and there growing the said Reynolds was caused to cross over the front end of said gondola car to climb aboard a tank car immediately in front of said gondola car as from the side of said tank car he would have been above the tops of said tall canes where said canes would not strike him as the moving train passed and where he could give said signal from the side of said tank car which would be visible to the engineer. The plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid the said Reynolds in the performance of the duties which would have been performed by the said Skelly had he been reasonably skilled and competent as a railroad brakeman, was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of such duties had the defendant not negligently failed to provide a reasonably safe place to work in allowing said tall canes to be and remain in close proximity to said railroad track at said place. The plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train, he fell from the said train and was run over by said train and was injured so that he died.

The plaintiff avers that the injuries and death of her husband and intestate, the said Hury O. Reynolds, was proximately caused by the negligent failure of the defendant to provide him with a reasonably safe place to work as aforesaid and the negligent failure of the defendant to provide him with an adequate number of competent fellow servants as aforesaid as a proximate consequence of all of

which the said Reynolds was injured so that he died and the plaintiff as his widow and total dependent suffered great pecuniary loss. The plaintiff avers that this action is brought under the Federal Employers Liability Act.

[fol. 12] Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for the Plaintiff.

Filed in open court July 2, 1947.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

SHERIFF'S RETURN

Executed this the 28th day of Aug. 1946 on Atlantic Coast Line Railroad Company, a corporation by leaving a copy of within with Guy Creasey, Agent of said Company.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, by Ben L. Ingram, D. S.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

DEMURRER

Comes the defendant the Atlantic Coast Line Railroad Company, by its Attorneys, and demurs to the plaintiff's complaint and assigns the following separate and several grounds of demurrer:

1. For that the averments thereof are insufficient to state a cause of action as for negligence against this defendant.

2. For that averments thereof are insufficient to constitute actionable negligence as against this defendant.

3. For that it does not appear therefrom with sufficient certainty how or wherein this defendant violated any duty it owed to the plaintiff's decedent.

4. For that it is not alleged with sufficient certainty what act or acts of the alleged servants or employees of this defendant negligently caused the alleged injury and death of plaintiff's decedent.

5. For that the allegations thereof are insufficient to show negligence on the part of a servant or employee of this

defendant as the proximate cause of alleged injury and death of plaintiff's decedent.

6. For that two separate and distinct causes of action are joined in one and the same count.

7. For that it does not appear with sufficient certainty how plaintiff's decedent received or sustained his alleged injuries.

8. For aught that appears from the allegation thereof the alleged injury and death of plaintiff's decedent as an employee was within the provisions of the Florida Work-[fol. 13] men's Compensation Act and not covered by the Act of Congress known as the Federal Employers Liability Act.

9. For that the allegations that the plaintiff's intestate was engaged in or employed in interstate commerce at the time he received his alleged injuries are but conclusions.

Graham, Bibb & Wingo, by Peyton D. Bibb, Attorneys for Defendant, Atlantic Coast Line Railroad Company.

Filed in office September 23, 1946.

In the Circuit Court, Tenth Judicial Circuit.

Amendment to Demurrers

Comes now the defendant and amends its demurrers heretofore filed to the Complaint herein by filing the same, and assigning each ground of demurrer therein originally severally set out, to the Complaint and to each count thereof, separately and severally, so that each of said several grounds of demurrer are directed to the complaint and to each separate count thereof, separately and severally, and further amends its said demurrers by adding the following separate and several additional grounds of demurrer to the complaint and to each count thereof separately and severally:

10. For that the averments of said count, and particularly the averment that "defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to

work'' is vague, indefinite, and uncertain and insufficient at law to show that defendant violated any duty owed to plaintiff's intestate.

11. For that the averments of said count are insufficient to show negligence as a matter of law on the part of this defendant as the proximate cause of the alleged injury and death of plaintiff's intestate.

12. For that the averments of said count are insufficient to show a violation by this defendant of any duty to plaintiff's intestate.

13. For that the averments of said count are insufficient in that it is not averred or stated therein how or wherein the defendant negligently failed to furnish plaintiff's intestate a reasonably safe place to work.

Graham, Bibb, Wingo & Foster, Attorneys for Defendant.

Filed in open court July 2, 1947.

[fol. 14] IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

DEMURRER OF DEFENDANT TO COMPLAINT AS LAST AMENDED

Comes now the defendant, Atlantic Coast Line Railroad Company, a corporation, and demurs to the plaintiff's complaint, as last amended, and to each count thereof separately and severally, and to such complaint, as last amended, and to each count thereof separately and severally, reassigns, separately and severally, each separate ground of demurrer hereto assigned in its original and amended demurrers, and assigns separately & severally the following additional grounds of demurrer to-wit:

14. For that it sets forth mere conclusions of the pleader.

15. For that the allegation that ''Hury O. Reynolds was unable to safely go over the side of said train'' is a bare conclusion of the pleader.

16. For that the averment that plaintiff's intestate was ''caused to place himself in a position of danger'' where, if he fell, he would fall between the moving railroad cars is a conclusion.

17. For that the averment quoted in Ground 16, supra, is a conclusion based on conclusion.

18. For that the averment quoted in Ground 16, supra, is vague, indefinite and uncertain.

19. For that the averments thereof are vague, indefinite and uncertain.

20. For that the averment that plaintiff's intestate "was unable to safely give said signal from the side of the railroad car upon which he was riding" is a conclusion of the pleader unsupported by any allegation of facts.

21. For that the allegation that defendant "negligently failed to provide an adequate number of competent fellow servants" is vague, indefinite and uncertain.

22. For that the allegation that defendant "negligently failed to provide an adequate number of competent fellow servants" is vague, indefinite and uncertain, in that it is not alleged and does not appear with sufficient certainty as to whether the failure to so provide employees was with respect to competence or with respect to number.

23. For that the averments thereof are insufficient to show negligence as a matter of law on the part of this defendant as the proximate cause of the alleged injury and death of plaintiff's intestate.

24. For that the averments thereof affirmatively show that the alleged failure of the defendant to furnish plaintiff's intestate with a reasonably safe place to work was not [fol. 15] the proximate cause of his said alleged injury and death.

25. For that it affirmatively appears from the averments thereof that the alleged failure of the defendant to furnish plaintiff's intestate with a reasonably safe place to work did not proximately cause or proximately contribute to the alleged injury and death of plaintiff's intestate.

26. For that it affirmatively appears from the averments thereof that the proximate cause of the alleged injury and death of plaintiff's intestate was his own action.

27. For that it affirmatively appears from the averments thereof that the sole proximate cause of the alleged injury and death of plaintiff's intestate was his own action in leav-

ing a place of safety and assuming a position of danger which was obvious to a person of reasonable intelligence.

28. For that it does not sufficiently appear from the averments thereof that plaintiff's intestate was directed or instructed by the defendant, or any of its servants, agents or employees acting within the line and scope of their authority, to place himself in a position of danger as therein alleged.

29. For aught that appears therefrom the sole proximate cause of the alleged injury and death of plaintiff's intestate was his own voluntary act in leaving a place of safety and assuming a dangerous position.

30. For aught that appears from the averments thereof the alleged injury and death of plaintiff's intestate was caused by his own negligence in placing himself in a position known to him to be dangerous or in placing himself in a position the danger of which was so open to observation as to be apparent to a person of ordinary intelligence.

31. For that the averments thereof are insufficient to show any right of recovery by plaintiff against this defendant for the alleged injury and death of plaintiff's intestate Hury O. Reynolds.

32. For aught that appears from the averments thereof the sole proximate cause of the alleged injury and death of plaintiff's intestate was his alleged fall from the car on which he was riding and it does not sufficiently appear from the averments thereof how or wherein any failure by the defendant to furnish said intestate a reasonably safe place to work proximately caused or proximately contributed to such fall.

33. For that it does not sufficiently appear from the allegations thereof that the alleged failure to furnish plaintiff's intestate a reasonably safe place to work proximately caused or proximately contributed to his fall from the train.

[fol. 16] 34. For that it appears from the averments thereof that the immediate efficient cause of the alleged injury and death of plaintiff's intestate was his alleged fall from the car and it does not appear therefrom with sufficient certainty how or wherein any negligence on the part

of this defendant proximately caused or proximately contributed to his said fall.

35. It does not sufficiently appear from the averments thereof how or wherein any act or failure to act on the part of the defendant proximately caused or proximately contributed to the alleged fall of plaintiff's decedent from the train.

36. It is not sufficiently alleged how or wherein defendant was negligent in furnishing plaintiff's intestate an incompetent and unskilled fellow employee at the time and place complained of.

37. For that the averments thereof are inconsistent and repugnant.

38. For that the averments thereof are but the argument and speculation of the pleader.

39. For that it does not appear from the averments thereof with sufficient certainty how or wherein any defect or insufficiency, due to the negligence of the defendant, in defendant's cars, engines, appliances, machinery, track, road bed, works, bolts, wharves or other equipment proximately caused the alleged injury and death of plaintiff's intestate.

40. For that it does not appear from the averments thereof with sufficient certainty how or wherein any defect or insufficiency, due to the negligence of the defendant, in defendant's cars, engines, appliances, machinery, track, road bed, works, bolts, wharves or other equipment proximately caused or proximately contributed to the alleged injury and death of plaintiff's intestate.

41. For that the averments thereof do not sufficiently show how or wherein any alleged negligence of defendant in failing to provide an adequate number of competent fellow servants to work with plaintiff's intestate proximately caused or proximately contributed to the alleged injury and death of plaintiff's intestate.

42. For that it does not sufficiently appear from the averments thereof how or wherein the alleged incompetence of W. E. Skelly, the alleged fellow servant of the plaintiff's intestate, proximately caused or proximately contributed to

the fall of the plaintiff's intestate from the train on the occasion alleged.

43. For that the averments thereof were insufficient to show any right of recovery by the plaintiff herein against the defendant for the matters and things therein alleged.

[fol. 17] 44. For aught that appears from the averments thereof the plaintiff's intestate's own voluntary action brought into being the situation of danger in which plaintiff's intestate is alleged to have been at the time he is alleged to have fallen from the train and received the injuries from which he died.

45. For that the proximate cause of the alleged fall of the plaintiff's intestate from the train at the time alleged is not set out with sufficient certainty but is left to speculation and conjecture.

46. For aught that appears to the contrary from the averments thereof the route or method taken by plaintiff's intestate in going over the front end of said railroad car was a reasonably safe method or means of performing his alleged duties.

47. From aught that appears to the contrary from the averments of said count, the plaintiff's said intestate was provided by the defendant an alternate route of travel, to get to the place where he was to perform his said duties, which said alternate route of travel was used by the plaintiff's said intestate and was a reasonably safe place to work.

48. For aught that appears from the averments thereof and notwithstanding the alleged presence of tall canes growing and remaining in close proximity to the alleged railroad track the plaintiff's intestate was furnished a reasonably safe place to perform his alleged duties at the time and place alleged.

49. For aught that appears from the averments thereof the alleged danger incurred, or dangerous position assumed, by plaintiff's intestate in climbing or crossing over the front end of said railroad car at the time and place alleged therein was danger normally expected to be encountered in or attendant upon the type of work he was engaged in as a

member of the crew engaged in the operation of the alleged freight train.

49a. For that the averments thereof are insufficient to show any constraint upon plaintiff's intestate to continue working under the conditions alleged therein.

50. For that the averments thereof fail to show any constraint upon plaintiff's intestate to continue to perform his alleged duties in the manner therein alleged after he discovered that he was unable to safely go over the side of said train because of the existence of the alleged tall canes in alleged close proximity to the railroad tracks as therein set out.

51. For that it is not alleged therein with sufficient certainty that the alleged tall canes were allowed to grow and remain in dangerous proximity to the alleged railroad track at the time and place alleged.

[fol. 18] 52. For that it is not sufficiently alleged how or wherein the defendant negligently allowed the tall canes to grow and remain in dangerous proximity to the alleged railroad track at the time and place complained of.

53. For aught that appears from the averments thereof the plaintiff's intestate could have given the alleged signal to the engineer of said train at a place other than the place at which the alleged tall canes were alleged to have been growing in proximity to the track as therein alleged.

54. For that the averments thereof are insufficient in law to show that any act, order or instruction of the defendant or of any servant, agent or employee acting in the line and scope of their employment by the defendant caused or required the plaintiff's intestate to cross over the front end of said gondola car in order to perform any acts or duties after it was discovered or developed that the alleged existence of the tall canes in close proximity to the railroad track would prevent said intestate, Hury O. Reynolds, from giving the alleged signal to the engineer while Reynolds was suspended from the side of the railroad car as therein alleged.

55. For that the averments thereof do not sufficiently show that the alleged assumption by Hury O. Reynolds of the duties of his fellow employee, W. E. Skelly, was the

proximate cause of Reynolds' alleged fall from the railroad car.

56. For that the averments thereof are insufficient to show that the alleged assumption by plaintiff's intestate, Hury O. Reynolds, of the duties of his follow employee, W. E. Skelly, was the proximate cause of, or proximately contributed to said Reynolds' alleged fall from the railroad car.

57. For that there is a misjoinder of causes of action.

58. For that two separate and distinct causes of action are joined in one and the same count.

59. For that the averments thereof are unnecessarily prolix.

60. For that the allegation concerning "place of much greater danger" is but a conclusion of the pleader.

61. For that the allegation concerning "much safer duties" is but a bare conclusion.

62. No facts are alleged to show that the danger to the said Reynolds was increased by going to another car and over [fol. 19] its side rather than going over the side of the Gondola car, even if there had been no tall canes along the side of the track.

63. Construing the said count most strongly against the pleader, the danger to Reynolds was not a danger or hazard that he would fall but, rather a danger that would occur, if he did in fact fall.

64. No facts are set forth to show that Reynolds was more likely to fall in going from one car to the other and over its side than in going over the side of the car where he was, even in the absence of tall canes along beside the said initial car.

65. No incompetence or incapacity of the fellow servant is averred in any plausible or logical manner as contributing proximately to the death of the said Reynolds.

66. The allegations concerning a place of "great danger" are not supported by any facts averred.

67. From aught that appears the allegation of "great danger" has to do with the consequence ensuing if he fell rather than with the likelihood or probability of his falling.

68. No lack of an adequate number of competent fellow servants is relied upon in said count as contributing proximately to the death of the said Reynolds.

69. No improper act or unskilled act or act lacking in diligence of any fellow servant is averred as contributing proximately to the death of the said Reynolds.

70. The allegation concerning a place of "much greater danger" is an unauthorized comparison, unsupported by appropriate averments of facts.

71. The allegation concerning a place of "much greater danger" is but a mere and bald conclusion, unsupported by any facts.

72. It does not appear whether the allegation of a place of "much greater danger" has to do with the proposition that the place was one where Reynolds was more likely to fall; or, from aught that appears to the contrary, was less likely to fall, but, if he did fall, was more likely to receive a fatal injury.

73. The place of "much greater danger," from aught that appears to the contrary, may have been a reasonably safe place to work.

74. The allegation of "much safer place of work" is but a mere and bald conclusion of the pleader.

75. The allegation concerning a "much safer place of work" is entirely consistent with the fact that both places were reasonably safe places of work.

[fol. 20] 76. The allegation concerning a "much safer place of work" is entirely consistent with a status that the place where the work was being done when Reynolds fell and was killed was a reasonably safe place to work.

77. The allegation concerning a "much safer place of work" is uncertain and confusing, and construing the same most strongly against the pleader may well mean that the place where the work was being done when Reynolds fell was one where he was less likely to fall but one where, if he did fall, he would be more likely to receive a fatal injury.

78. The allegation concerning "much safer duties" is but a mere and bald conclusion of the pleader.

79. The allegation concerning "much safer duties" is consistent with the fact that the new duties were being performed at a place which was a reasonably safe place to work.

80. The said count combines two causes of action, namely, negligence in not furnishing a reasonably safe place to work, and negligence in furnishing a fellow servant who was not competent.

81. For that it appears from the averments thereof that the alleged danger to the deceased Reynolds was not a danger or hazard that he would fall from the train but rather a danger that would arise if he did in fact fall from the train.

Graham, Bibb, Wingo & Foster, Attorneys for Defendant.

Filed in open Court July 2, 1947.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

ORDER SUSTAINING DEMURRER AND GRANTING MOTION FOR NON-SUIT—July 2, 1947

Minute Entry

On this the 2nd day of July, 1947, came the parties by their attorneys, and plaintiff by separate paper filed adds Counts Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve, and strikes the words "weeds and" wherever said words appear together in the complaint; plaintiff in open court withdraws counts One through nine inclusive; defendant by separate paper filed amends demurrer by adding grounds 10 thr-u- 13; defendant by separate paper filed further amends demurrer by adding grounds 14 thr-u- 81; and defendant assigns each ground of the demurrer as amended, separately and severally, to Counts Ten, Eleven & Twelve, separately and severally; the demurrer as amended to each of said counts is by the court heard and considered, whereupon,

It is ordered and adjudged by the court that said demurrer be and the same is hereby sustained; on account of

[fol. 21] and solely because of the court's sustaining the amended demurrer to Counts Ten, Eleven and Twelve, the plaintiff moves the court for a non-suit, with notice of appeal to the Supreme Court, whereupon,

It is ordered and adjudged by the court that plaintiff's motion for non-suit be and the same is hereby granted and a non-suit in this case is hereby declared and entered, and that the defendant go hence without day and have and recover of the plaintiff all costs herein accrued for which execution may issue.

Security for costs on appeal omitted in printing.

[fol. 22] In the Circuit Court, Tenth Judicial Circuit of Alabama

Citation of Appeal to Supreme Court

To Atlantic Coast Line Railroad Company, a corporation, or Graham, Bibb & Wingo, their attorneys of record, Greeting:

Whereas, Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, has taken an appeal from the judgment by the Circuit Court of the Tenth Judicial Circuit of Alabama, for the County of Jefferson, State of Alabama, in the cause wherein Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, is Plaintiff, and Atlantic Coast Line Railroad Company, a corporation, is Defendant.

Now, you are, therefore, cited to appear at the next Term 1947, of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper to do so.

Witness my hand, this 11 day of September, 1947.

O. L. Andrews, Circuit Clerk.

Sheriff's Return

Executed this the 13th day of Sept., 1947, on Graham, Bibb and Wingo, Attorneys, by leaving a copy of within with D. P. Wingo, Agent of said Attorneys.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, by Ben L. Ingram, D. S.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 24-25] In Supreme Court of Alabama

Specifications of Error

Now comes the appellant, Mrs. Marie Reynolds, who sues as the Administratrix of her husband, Hury O. Reynolds, Deceased, (Plaintiff Below) and says that in the trial and other proceedings had in this cause in the court below manifest error occurred to her great injury and damage as follows, to-wit:

1. For that the court erred in sustaining the defendant's demurrer to Count 10 of the plaintiff's complaint. (R. p. 20)

2. For that the court erred in sustaining the defendant's demurrer to Count 11 of the plaintiff's complaint. (R. p. 20)

3. For that the court erred in sustaining the defendant's demurrer to Count 12 of the plaintiff's complaint. (R. p. 20)

4. For that the court erred in sustaining the defendant's demurrer to the plaintiff's complaint. (R. p. 20).

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Appellant.

[fol. 26] The State of Alabama, Judicial Department, The Supreme Court of Alabama, October Term, 1947-48

6 Div. 643

Marie Reynolds, Admrx.

v.

Atlantic Coast Line Railroad Co.

Appeal from Jefferson Circuit Court

Opinion—June 24, 1948

Livingston, Justice:

This is an action under the Federal Employers' Liability Act by Mrs. Marie Reynolds, who sues as the administratrix

of the estate of her husband Hury O. Reynolds, deceased, against the Atlantic Coast Line Railroad Company to recover damages for his death (45 U. S. C. A., sections 51, *et seq.*).

The complaint as originally filed and as subsequently amended consisted of twelve counts. Under Rule 28 of this Court, however, the record has been abridged, and for the purposes of this appeal the complaint consists only of counts 10, 11 and 12.

Defendant's amended demurrer to counts 10, 11 and 12 of the complaint was sustained, and because of this adverse ruling plaintiff suffered a nonsuit, and reserved that ruling for this Court's decision. There is thus here presented the single question of the sufficiency of counts 10, 11 and 12.

In count 10, after the required averments of interstate commerce, the plaintiff alleged that her husband had been killed on November 10, 1945, near Lake Harbor, Florida, while working as a member of the train crew of defendant's freight train No. 567. The culpability ascribed was that defendant failed to furnish the deceased with a reasonable safe place to work. It was alleged that freight train No. [fol. 27] 567 consisted of an engine and tender and sixteen cars and a caboose; that the ten cars immediately behind the tender were to be cut out of the train at Lake Harbor, and left upon a siding there; that in connection with the intended switching movement, the deceased had taken his position at the lead end of the sixth car ahead of the caboose (and just back of the lead ten cars), where the train was thus to be uncoupled; that as said freight train approached the point where the switching movement was to be made and where the ten cars were to be detached from the train, it passed over the track rendered dangerous by the close proximity of tall canes negligently permitted to grow and remain there; that in the performance of his duties, the deceased was required to pass a signal to the engineer to indicate to him when to stop the train at the appropriate point so as to uncouple the first ten cars from the remainder of the train, and place them on the side track. The count then charged that the signal, which the deceased was thus required to pass to the engineer, ordinarily would have been given as the deceased was suspended from the right side and lead end of the sixth car ahead of the caboose, but that in this instance he was unable to follow that routine because of the tall canes which, as the train moved forward,

might scrape him off the side of the car; that he was thus required to cross from the lead end of the sixth car ahead of the caboose, a gondola car, in order to climb aboard a tank car immediately in front of said gondola car as from the side of the tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes, and as he could give said signal from the side of the tank car which would be visible to the engineer; that while thus crossing from the one car to the other, the train being in motion, the deceased was thereby caused to enter a place of much greater danger than that with which he would have been confronted had he been able to signal in the ordinary and usual fashion from the right end of the gondola car; and that while so acting under those circumstances of enlarged danger, he fell between the cars and was run over and killed.

In count 11 the plaintiff ascribes her husband's death to the negligent failure of defendant to provide an adequate number of competent fellow servants to work with him in the performance of their duties on the occasion of his death. That the defendant, as a co-worker of the deceased, furnished a brakeman named Skelly, who was so *in*competent and unskilled that he could not perform his appointed duties [fol. 28] as brakeman to signal the engineer when to stop the train preliminary to the intended switching movement, and that Reynolds, the deceased, was thus required to take over Skelly's job (thereby quitting a safer place of work and the performance of safer labors, in turn undertaken by defend*ant*'s conductor), and while thus performing the appointed duties of Skelly, who at that time was standing idle and doing no work whatsoever, Reynolds fell between the two cars of the moving train and was run over and killed.

The theory of liability asserted in count 12, is in substance, a combination of counts 10 and 11 stated in somewhat greater particularity. It relies upon defendant's negligent failure to furnish the deceased with a reasonably safe place to work, coupled with its negligent failure to provide an adequate number of competent fellow servants to work with him. It charged that defendant provided Skelly as one of the two brakemen on the train; that Skelly was incompetent, and that his duties had to be assumed by deceased, who ordinarily would have signaled the engineer as outlined in count 10, but that because of the danger from

the canes, and while performing Skelly's duties, and in attempting to cross from one car to another he fell between the cars and was killed.

The case of course is governed by the federal decisions, and as we have recently said in the case of *Atlanta, Birmingham and Coast R. R.* v. *Cary*, MS (6 Div. 663), "Under these decisions the Federal Employers' Liability Act does not make the employer the insurer of the safety of the employee while on duty. And the basis of the liability is the negligence of the employer, not the fact that injuries occur. Negligence must be 'in whole or in part' the cause of the injury."

A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident. *Tennant* v. *Peoria and Pekin Union Railway*, 321 U. S. 29, 88 L. ed. 520; *Tiller* v. *Atlantic Coast Line R. R.*, 318 U. S. 54, 87 L. ed. 610; *Atlanta, Birmingham and Coast R. R.* v. *Cary*, *supra*; *Alabama Great Southern R. R.* v. *Davis*, 246 Ala. 64, 18 So. 2d 737.

It is well understood that negligence may be averred in general terms, but if the pleader attempts to set out the *quo modo* of the negligence charged, then the facts alleged must in law constitute negligence, and no particular form is required in alleging the causal connection between the negligence charged and the injury. Where the acts of negligence are alleged, as a general rule it is sufficient to [fol. 29] make a direct general allegation that plaintiff's injury resulted from such negligent act or that such negligent act caused the injury. And in suits under the Federal Employers' Liability Act a general allegation that the injury resulted in whole or in part from such negligent act, or that such negligent act caused, in whole or in part, the injury is sufficient.

Also, "Where facts are alleged which show a causal connection between the alleged negligence and the injury, the complaint need not expressly state that such negligence was the proximate cause of the injury. It is sufficient that facts are alleged which, on a reasonable construction, create an inference or lead, with reasonable certainty, to the conclusion that the injury proximately resulted from the negligence charged, as where the complaint sets forth the facts constituting the negligent act or omission complained

of, and discloses in logical sequence the facts composing the secondary agency, force, or obstacle; if any, and details the resultant injury. But where the specific facts alleged to show that defendant's negligence was the proximate cause of plaintiff's injury are susceptible of different inferences, no inference in favor of the ultimate fact can be drawn in aid of the complaint." 45 Corpus Juris pp. 1195-6, section 668; *Birmingham, R. L. & P. Co.* v. *Hinton*, 141 Ala. 606, 37 So. 635; *Vulcan Revit Corp.* v. *Lawrence*, 214 Ala. 378, 108 So. 3; *Central of Georgia R. R.* v. *Bell*, 187 Ala. 541, 65 So. 835; *Birmingham R. L. & P. Co.* v. *Fisher*, 173 Ala. 623, 55 So. 995; *Louisville & Nashville R. R.* v. *Vanzant*, 158 Ala. 527, 48 So. 389.

The most that can be said of count 10 is that defendant's alleged negligent failure to furnish deceased with a reasonably safe place to work consisted in allowing tall canes to grow in close proximity to the railroad track, and which negligence caused plaintiff's intestate, Reynolds, to pursue a different course of conduct, and one alleged to be more hazardous from that ordinarily followed in signaling the engineer, and that while pursuing said different course of conduct he fell between the cars and was killed. Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader. As we have pointed out, the causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture. No where in count 10 is it made to appear what caused Reynolds to fall [fol. 30] between the cars. Climbing or going from one car to another on a moving freight train, in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous, the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care.—*Ellis* v. *Union Pacific R. R.*, 91 L. ed. 433. In order to state a cause of action, it must be made to appear by proper averments that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of

the attending circumstances. *Brady* v. *Southern Ry.*, 320 U. S. 476, 88 L. ed. 239; *Louisville & Nashville R. R.* v. *Maddox*, 236 Ala. 594, 183 So. 849. Count 10 does not meet these requirements.

As stated, count 11 is predicated upon defendant's failure to provide sufficient help. When such a failure results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers' Liability Act, but to permit recovery in such case it must be made to appear that such failure was the proximate cause of the accident. To recover, plaintiff is required to allege and prove not only that the railroad was negligent, but that the injury resulted proximately, in whole or in part, from that negligence.—Authorities, *supra*. See, also, *Deere* v. *Southern Pacific R. R.*, 123 Fed. 2d 438; *Marshall* v. *Chicago, etc., R. R.*, 131 Minn. 392, 155 N. W. 208; *Strunks* v. *Payne*, 184 N. C. 582; *Healey* v. *N. Y., O. & W. R. R.*, 79 Fed. 2d 542. Count 11 is subject to the same criticism as is count 10. The causal connection between the negligence complained of and the injury sustained is not made to appear, but is left to speculation and conjecture only.

Conceding that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of Reynolds. It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause, which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death.—Authorities *supra*.

Count 12 is but a combination of counts 10 and 11. In support of count 12 appellant cites *Union Pacific R. R.* v. [fol. 31] *Hadley*, 246 U. S. 330, 62 L. ed. 751, 3 S. C. 318, and *Blair* v. *Baltimore & Ohio R. R.*, 323 U. S. 600, 89 L. ed. 490, 65 S. C. 545. In the latter case, Mr. Justice Black, said: "The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific R. Co. v. Hadley, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely inter-

woven as to form a single pattern, and where each imparts character to the others." This principle has no application here. The defect in each count of the complaint is not in its failure to allege negligence, but failure to allege facts showing a causal connection between that negligence and the death of Reynolds. Count 12 is as defective in this regard as are counts 10 and 11.

The trial court properly sustained demurrer to all these counts.

Affirmed.

All the Justices concur.

[fol. 32] THE SUPREME COURT OF ALABAMA

6 Div. 643

MRS. MARIE REYNOLDS, Who Sues as Administratrix of the Estate of Hury O. Reynolds, Deceased,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation

JUDGMENT—June 24, 1948

Come the parties by attorneys and the record and matters therein assigned for error, being argued and submitted and duly examined and understood by this Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is, Therefore, Considered, Ordered And Adjudged that the judgment of the Circuit Court be in all things affirmed.

It Is Also Considered, Ordered And Adjudged that Mrs. Marie Reynolds, as administratrix of the Estate of Hury O. Reynolds, appellant, and J. K. Jackson, Erle Pettus and Al. G. Rives, sureties on the appeal bond, pay the cost of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemption under the laws of Alabama, let execution issue accordingly.

[fol. 33] SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING—Filed June 26, 1948

Now comes Mrs. Marie Reynolds, as Administratrix of the Estate of her deceased husband, plaintiff in the court below, and here the appellant, and respectfully moves the Court for a rehearing and that the judgment of the Court herein of to-wit, June 24, 1948, be set aside, and that a further judgment be rendered, reversing the judgment of the Court below, and in support thereof, the defendant respectfully prays that this Court will reconsider the briefs heretofore filed in her behalf, together with the following. (Brief herewith submitted).

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Appellant.

[fol. 34] THE SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—June 30, 1948

It is ordered that the application for rehearing filed by the appellant on June 26, 1948, after being duly examined and considered by the Court, be and the same is hereby overruled.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 25, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.